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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

PAUL BIBLE, JERRY LOCKHART, BARTON JACKA, and the present members of the NEVADA GAMING COMMISSION, and the NEVADA STATE GAMING CONTROL BOARD,
Petitioners,

v.

CARL WESLEY THOMAS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FRANKIE SUE DEL PAPA
Attorney General of the
State of Nevada

BROOKE A. NIELSEN
Assistant Attorney General

ROSS A. HODGE
Deputy Attorney General
Gaming Division
Building D, Suite 880
4220 S. Maryland Parkway
Las Vegas, Nevada 89158
Telephone (702) 486-6612

Attorneys of Record

QUESTIONS PRESENTED

I. WHETHER THE CIRCUIT COURT'S FAILURE TO DIFFERENTIATE BETWEEN THE TERMS "FRIVOLOUS," "UNREASONABLE" AND "WITHOUT FOUNDATION," THE CRITERIA GOVERNING A DISTRICT COURT'S AWARD OF ATTORNEYS' FEES TO PREVAILING DEFENDANTS, IS INCONSISTENT WITH CHRISTIANSBURG GARMENT CO. V. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, 434 U.S. 412 (1978) AND HUGHES V. ROWE, 449 U.S. 5 (1980).

II. WHETHER THE CIRCUIT COURT EXCEEDED ITS JURISDICTION BY FAILING TO REMAND THE CASE TO THE DISTRICT COURT WHERE THE BASIS OF THE FEE AWARD WAS NOT CLEAR FROM THE FACE OF THE DISTRICT COURT'S ORDER.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

PAUL BIBLE, JERRY LOCKHART, BARTON JACKA, and the present members of the NEVADA GAMING COMMISSION[1], and the NEVADA STATE GAMING CONTROL BOARD[1],

Petitioners,

v.

CARL WESLEY THOMAS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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[1] The present members of the Nevada Gaming Commission are: Bill Curran, Chairman; Bob Lewis; Deborah Griffin; William Urga; and Augie Gurrola. The (continued...)

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

COME NOW PAUL BIBLE, former member of the Nevada Gaming Commission, JERRY LOCKHART, former member of the Nevada Gaming Commission, BARTON JACKA, former member of the Nevada State Gaming Control Board, and the present members of the NEVADA GAMING COMMISSION, and the present members of the NEVADA STATE GAMING CONTROL BOARD, and Frankie Sue Del Papa, the Attorney General of the State of Nevada, and file this petition for writ of certiorari seeking reversal of the opinion of the Ninth Circuit Court of Appeals and remand to the district court.

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[1] (...continued)
present members of the Nevada State Gaming Control Board are: William A. Bible, Chairman; Thomas M. Roche, Steve DuCharme.

OPINIONS AND JUDGMENTS BELOW

The Opinion of the Ninth Circuit Court of Appeals was filed January 7, 1993, and is reproduced in Appendix A. Thomas v. Bible, 983 F.2d 152 (9th Cir. 1993).

The Order of the United States District Court for the District of Nevada awarding defendants attorneys' fees and costs, entered on April 11, 1990, is reproduced in Appendix B.

JURISDICTIONAL STATEMENT

This case arises from an award of attorneys' fees to the prevailing defendants pursuant to 42 U.S.C. Section 1988.

The jurisdiction of this Court is invoked under Section 1254(1) of Title 28 of the United States Code.

STATUTORY PROVISIONS INVOLVED

The case involves Section 1988 of Title 42 of the United States Code. [Appendix C].

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

The Nevada Gaming Commission ("Commission") commenced an exclusion list proceeding against Carl Wesley Thomas ("Thomas") on December 17, 1986, and which continued on January 22, 1987.[2] Thomas did not attend his hearing and no witnesses were called on his behalf. CR 16, Vol. I at 192, through Vol. II at 880, 951-1083.

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[2] The Nevada legislature declared that the exclusion or ejection of certain persons from licensed gaming establishments is necessary to effectuate the state public policy and to maintain the strict regulation of licensed gaming, which is deemed vitally important to the state. Nev. Rev. Stat. § 463.151(1) (1992). Persons placed on the exclusion list are to be excluded or ejected from licensed gaming establishments. A person placed on the exclusion list who enters a licensed gaming establishment is guilty of a gross misdemeanor. Nev. Rev. Stat. § 463.155 (1992). A gaming licensee who knowingly fails to exclude or eject a person on the exclusion list is subject to discipline by revocation, suspension, limitation or condition of its gaming license. Nev. Rev. Stat. § 463.154 (1992).

On January 22, 1987, the Commission voted unanimously to place Thomas on the exclusion list, finding him a person whose presence in a casino would pose a threat to the interests of the State of Nevada and licensed gaming.[3] CR 16, Vol. II at 1039-52, 1058-61, 1133-41.

II. PROCEEDINGS IN THE COURTS BELOW

On July 10, 1987, Thomas filed a complaint against former members of the Commission, Paul A. Bible and Jerry Lockhart, and former member of the Nevada State Gaming Control Board ("Board"),

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[3] The Commission's decision was based upon (1) Thomas' 1983 conviction on ten counts of skimming and related felonies involving the Tropicana Hotel and Casino; (2) Thomas' testimony in the 1985 skimming case involving the Stardust Hotel and Casino, whereby he admitted to skimming from several Las Vegas casinos over a long period of time; (3) the fact that he committed these crimes while holding a Nevada gaming license. United States v. DeLuna, 763 F.2d 897 (8th Cir. 1985), cert. denied, 474 U.S. 980 (1985); CR 16 Vol. I at 487-507, Vol. II at 542-624.

Barton Jacka, in their individual capacities, and the present members of the Commission and the Board in their official capacities in the United States District Court for the District of Nevada. CR 1. The district court had original jurisdiction over the matter based on 28 U.S.C. Section 1343.

The complaint alleged four causes of action: (1) 42 U.S.C. Section 1983 to redress alleged "deprivation, under color of state law, of plaintiff's rights and privileges secured by the due process clause of the Fourteenth Amendment," CR 1 at 1; (2) 42 U.S.C. Section 1985(2) to redress injuries resulting from an alleged conspiracy to procure state administrative action against plaintiff based upon improper evidence and improper procedures with the intent to "maliciously deprive plaintiff of his property rights and the equal protection of the laws", CR 1 at 2;

(3) declaratory relief from placement on the list, CR 1 at 13-14; and (4) a permanent injunction to prevent the Commission from again attempting to place Thomas on the exclusion list, CR 1 at 14-15.

Defendants filed a motion to dismiss on September 28, 1987. CR 2. On February 29, 1988, the district court converted the motion to one for summary judgment, and gave the parties an opportunity to submit additional materials in support of their respective positions. CR 28. The district court entered an order granting complete summary judgment in favor of defendants on August 11, 1988. CR 3. Subsequently, defendants' filed a motion for attorneys' fees. CR 40. The district court deferred ruling on the motion for attorneys' fees, due to Thomas' appeal of the summary judgment to the Ninth Circuit Court of Appeals on September 9, 1988. CR 51, 39.

The Court of Appeals later affirmed the summary judgment in favor of defendants, but denied defendants' request for attorneys' fees, concluding that the appeal was not "frivolous." CR 55, 56.

The district court then entered an order on April 11, 1990 granting defendants' motion for attorneys' fees pursuant to 42 U.S.C. Section 1988. CR 58. Thomas appealed the award of attorneys' fees on April 18, 1990. The basis for jurisdiction of the Court of Appeals was 28 U.S.C. Section 1291. The Court of Appeals filed an opinion on January 7, 1993 reversing the order of the district court granting fees, finding that since the appeal was not frivolous, the underlying action was not frivolous. The court made no distinction between the three criteria upon which the award could have been based. Thomas v. Bible, 983 F.2d 152 (9th Cir. 1993), [Appendix A].

SUMMARY OF THE ARGUMENT

This Petition should be granted because the circuit court's interpretation of the criteria governing an award of attorneys' fees to prevailing defendants pursuant to 42 U.S.C. Section 1988 is inconsistent with the decisions of this Court in Christiansburg Garment Co. v. Equal Employment Opportunity Commission, 434 U.S. 412 (1978) and Hughes v. Rowe, 449 U.S. 5 (1980). The circuit court has failed to ascribe different meaning to the terms, "frivolous," "unreasonable" and "without foundation."

This Petition should be granted because a decision on this issue will greatly impact the ability of federal, state and local governmental bodies as defendants in civil rights actions to recover their expenses of defending frivolous, unreasonable or unfounded complaints at a time when federal, state

and local financial resources are already insufficient to meet the growing needs of their citizens. The Ninth Circuit's conclusion would effectively restrict awards of attorneys' fees to only bad faith cases. This appears to be a result unintended by this Court.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S FAILURE TO DIFFERENTIATE BETWEEN THE TERMS "FRIVOLOUS," "UNREASONABLE," AND "WITHOUT FOUNDATION," THE CRITERIA GOVERNING A DISTRICT COURT'S AWARD OF ATTORNEYS' FEES TO PREVAILING DEFENDANTS IS INCONSISTENT WITH CHRISTIANSBURG GARMENT CO. V. EQUAL EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, 434 U.S. 412 (1978) AND HUGHES V. ROWE, 449 U.S. 5 (1980).

A. The Ninth Circuit erred in reviewing the award of attorneys' fees based solely on a frivolousness standard, without giving meaning or effect to the terms "unreasonable" and "without foundation."

In Christiansburg Garment Co. v. Equal Employment Opportunity Commission, 434 U.S. 412 (1978), this Court, in analyzing an award of attorneys' fees to a prevailing

defendant under Title VII of the Civil Rights Act of 1964 [42 U.S.C. Section 2000(e)], held that "a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." Id. at 420.

In Hughes v. Rowe, 449 U.S. 5, (1980), this Court examined the broad general question as to what standard should be used to evaluate a district court's discretion where the defendant was the prevailing party in a 42 U.S.C. Section 1983 action. This Court expressed the view that it could see no reason for applying a less stringent standard in 42 U.S.C. Section 1983 cases than that applied in Title VII cases by Christiansburg, 434 U.S. 420.

The Ninth Circuit reversed the award of attorneys' fees granted by the district

court pursuant to 42 U.S.C. Section 1988. The circuit court reasoned that since it had concluded that the appeal from summary judgment was not frivolous, the circuit court had by necessary implication also determined that Thomas' action was not frivolous. The circuit court held that its prior determination that Thomas' action was nonfrivolous was binding on the district court as law of the case. Consequently, the district court's failure to apply law of the case was an abuse of discretion. Thomas, Appendix A at pp.9-10.

Although the majority determined the action was not "frivolous," the majority did not address whether the action was "unreasonable" or "without foundation," the other criteria established by Christiansburg and Rowe. The majority interpreted the terms "frivolous", "unreasonable" and "without foundation" "[as not having] appreciably different

meanings." Thomas, Appendix A at pp.15-16 n.2. (Emphasis added.) The majority clearly misinterpreted the criteria established by this Court.

Justice Noonan in the dissent analyzes the standard for the award of fees as set forth in Christiansburg in a manner consistent with the plain meaning of the language used by this Court in establishing the criteria. As explained in the dissent,

> "[t]he standard set by the Court is in the disjunctive. We err in blithely assuming that the Court engaged in rhetorical surplusage or stuttered saying in five words what required only one. The ordinary rules of construction require that the alternatives put in the disjunctive should not be collapsed into a single standard."

Id. at p.13.

The Court in Christiansburg adopted the concept of the language of two circuit courts and qualified the words used "by pointing out that the term 'meritless' is

to be understood as meaning groundless or without foundation, rather than simply that the plaintiff has ultimately lost his case, and that the term 'vexatious' in no way implies that the plaintiff's subjective bad faith is a necessary prerequisite to a fee award against him." Christiansburg, 434 U.S. at 421. The qualification of the terms provided by this Court indicates that the terms do have distinct meanings.

The terms can be differentiated by a descending degree of culpability and different mental states the plaintiff may possess at the time his action is filed. The term "frivolous" connotes actual awareness or belief of the fact that the action has no merit under a subjective or objective test. "Without foundation" connotes no knowledge or avoidance of knowledge of the fact that the action has no merit under a subjective or objective test. "Unreasonable" connotes actual

subjective knowledge which is contrary to fact from an objective standpoint. A person may have believed that his action had merit but have had no reasonable grounds for such belief. See Rollin M. Perkins, Perkins on Criminal Law, 775 (2d. Ed., 1969).

While all three types of conduct, ("frivolous," "without foundation," "unreasonable"), cover a range of behavior which is the product of different and distinct "mind-sets" of the plaintiff, each category of conduct forms a separate basis for an award of attorney's fees to a prevailing defendant. Because a "frivolous" claim indicates a greater degree of culpability than an "unreasonable" claim, a claim may be "unreasonable" yet not "frivolous." To hold that such an attorney's fee award depends upon proof of the higher, subjective culpability standard of

frivolousness would be tantamount to creating a requirement that prevailing defendants must prove the equivalent of "bad faith" in order to be awarded an attorney's fee under 42 U.S.C. Section 1988. This result has been specifically rejected by this Court. See Christiansburg Garment Co., 434 U.S. at 419.

It is apparent that the circuit court did not review the record for support of the award of fees on the grounds that the action was "unreasonable" or "without foundation." The circuit court consciously did not address the other criteria because the court determined the terms did not have appreciably different meaning. The circuit court erred in ascribing one meaning to the three different criteria established by this Court.

This Court has previously recognized that whether a pleading is well grounded in fact and legally tenable depends greatly on

factual determinations which the district court is in the best position to make. Cooter & Gell v. Hartmax Corp., 496 U.S. 384 (1990). The Ninth Circuit erred in its interpretation of the criteria governing the award of attorneys' fees and consequently, in its failure to remand the case to the district court for further findings of fact and conclusions of law relating to the alternative criteria of "unreasonable" and "without foundation."

II. THE NINTH CIRCUIT EXCEEDED ITS JURISDICTION BY FAILING TO REMAND THE CASE TO THE DISTRICT COURT WHERE THE BASIS OF THE FEE AWARD WAS NOT CLEAR FROM THE FACE OF THE DISTRICT COURT'S ORDER.

A. The Ninth Circuit erred in substituting its judgment for that of the district court when it reviewed the award of fees.

The district courts may award attorneys' fees under section 1988 at their discretion. The standard of appellate review of an award of attorneys' fees under 42 U.S.C. Section 1988 is "abuse of

discretion." Jensen v. Stangel, 762 F.2d 815, 817 (9th Cir. 1985).

The circuit courts have commented frequently on the meaning of the "abuse of discretion" standard. In Pirus v. Bowen, 869 F.2d 536 (9th Cir. 1989), the court addressed the "abuse of discretion" standard as it related to an attorneys' fees case under the Equal Access to Justice Act ("EAJA"). The court commented that although the court might be inclined to reach a result that differs from the result reached by the district court, the "abuse of discretion" standard forecloses the appellate court from exercising independent judgment on the reasonableness of the losing party's position. Pirus, 869 F.2d at 540. The appellate court "may not substitute [its] view ... for that of the district court ... [but] is limited to assuring that the district court's determination has a basis in reason." Id.

This is a " highly deferential standard of review." Id.

Under the "abuse of discretion" standard, "the relevant inquiry is not how the reviewing judges would have ruled if they had been considering the case in the first place, but rather, whether any reasonable person could agree with the district judge." Deitchman v. E.R. Squibb & Sons, Inc., 740 F.2d 556, 563 (7th Cir. 1984)(emphasis in original). "If reasonable men could differ as to the propriety of the ... court's action, no abuse of discretion has been shown." Id. at 564. It is the very nature of discretion that two adjudicators may have the opposite opinion on the same subject, yet both be within the bounds of permissible discretion.

The circuit court failed to give deference to the discretionary action of the district court or any consideration of

the reasonableness of the district court's action in awarding the fees. The circuit court merely concluded that a nonfrivolous appeal necessarily implies a nonfrivolous action. Thomas, Appendix A at p.7. In drawing this conclusion, and imposing it on the district court as law of the case, the circuit court erroneously substituted its own judgment for that of the district court.

B. The Ninth Circuit erred in failing to remand the case for a determination as to whether the award was based upon the common law subjective bad faith standard or the Christiansburg/Rowe standard.

The district court in its order awarding fees failed to provide specific findings of fact and conclusions of law for the basis of the award of fees. In reviewing the order, the circuit court and the parties were required to assume the legal basis of the award. The circuit court assumed the award of fees was based

upon the objective standard of frivolousness of the underlying action as opposed to the standard of subjective bad faith. However, the record reflects evidence of subjective bad faith sufficient to support the district court's order.

Such bad faith was apparent to Justice Noonan who commented:

> [T]his ringleader of the skimmers [Thomas] had been kicked out of gambling in Nevada. Inferentially, he was mad and wanted to harass the officials who had enforced the law against him. He brought an action that all agree was meritless.

Thomas, Appendix A at p.14.

Justice Noonan further suggested:

> [T]o remove all doubt it would be appropriate to follow what we have laid down for a case where such findings are not made and the record is not completely obvious as to the reason for the fee award, and remand to the district court to 'make findings of fact and conclusions of law supporting its decision so that there is a basis for appellate review.'

Id. at pp.14-15.

As is indicated in the dissent, the record is not clear as to the reason for the fee award. Since the record is not clear, the circuit court should have remanded the case to the district court. By imposing its own conclusions on the district court, where the district court's order was not clear, the circuit court exceeded its jurisdiction. The circuit court erred in not remanding the case.

C. The Ninth Circuit erred in applying the doctrine of law of the case to the frivolousness issue.

The circuit court held that its prior determination as to frivolousness with regard to the previous appeal by necessary implication was determinative of the issue as to frivolousness of the action. Id. at p.7. The court stated that, "[b]ecause, by necessary implication, we previously determined that Thomas's action was not frivolous, the preclusive doctrine of law of the case is applicable." Id. at p.8.

The circuit court recognizes that "[t]here may be cases in which a non-frivolous or even a meritorious appeal could be taken from an order granting summary judgment against a plaintiff who has filed a frivolous action." Id. at p.6. However, the court justifies its holding by explaining that "in this case we addressed the merits of Thomas' claims exclusively. The question before us previously was whether the award of summary judgment for defendants on the merits was proper. In such circumstances, the merits of the appeal are inseparable from the merits of the underlying action." Id. at p.7.

The circuit court's conclusion that the merits of the appeal are inseparable from the merits of the underlying action is fallacious. The circuit court's determination of frivolousness was with regard to an award of attorneys' fee

on appeal. As the court stated "appellate sanctions are discretionary, [and] it does not necessarily follow that we will award fees even where a district court's award of attorneys' fees under 42 U.S.C. Section 1988 is upheld on appeal." Id. The circuit court obviously recognizes that the permissible range of discretion is very broad. Because an award of attorneys' fees on appeal is discretionary, as is an award under 42 U.S.C. section 1988, the exercise of discretion of one adjudicator cannot be substituted for the discretion of another. Pirus v. Bowen, 869 F.2d 536, 540 (9th Cir. 1989). As Justice Noonan so aptly states, "our characterization of the appeal as not frivolous was functionally equivalent to a discretionary decision not to award attorneys' fees. The exercise of this discretion by us cannot establish 'law of the case' for the exercise of discretion by the district court." Thomas, Appendix A at

pp.11-12. Accordingly, the circuit court's imposition of its discretion upon the district court by the application of the doctrine of law of the case to a matter within the discretion of the district court was erroneous.

CONCLUSION

For the reasons discussed above, the Petitioners respectfully request this Court grant certiorari, receive briefs on the merits, and ultimately reverse the judgment of the Ninth Circuit Court of Appeals.

Respectfully submitted,

FRANKIE SUE DEL PAPA
Attorney General of the
State of Nevada

BROOKE A. NIELSEN
Assistant Attorney General

ROSS A. HODGE
Deputy Attorney General
Gaming Division
Building D, Suite 880
4220 S. Maryland Parkway
Las Vegas, Nevada 89158
(702) 486-6612

Attorneys of Record

APPENDICES

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CARL WESLEY THOMAS, Plaintiff-Appellant, vs. PAUL BIBLE, et al., Defendants-Appellees.	)	No. 90-15558 D.C. No. CV-S-87-526 RDF OPINION

Appeal from the
United States District Court
for the District of Nevada
Roger D. Foley, District Judge, Presiding

Argued and Submitted
March 11, 1992 - San Francisco, California

Filed January 7, 1993

Cite as: 983 F.2d 152 (1993)

Before: Stephen Reinhardt,
John T. Noonan, Jr.,
and David R. Thompson,
Circuit Judges

Opinion by Judge Reinhardt;
Dissent by Judge Noonan

C O U N S E L

Bruce Judd, Las Vegas, Nevada
for the plaintiff-appellant

Gloria Stendardi, Deputy Attorney
General, Las Vegas, Nevada
for the defendants-appellees.

O P I N I O N

REINHARDT, Circuit Judge:

Carl Wesley Thomas, who unsuccessfully charged the members of the Nevada Gaming Commission and others with violating his civil rights, appeals the district court's award of attorneys' fees to the defendants. Because the award is contrary to law, we reverse.

Thomas brought a § 1983 action in which he alleged that the Commission's decision to exclude him from licensed gaming establishments violated his Fifth Amendment right against self-incrimination and the Fourteenth Amendment guaranties of due process and equal protection of the laws. The district court granted defendants' motion for summary judgment in

a thirty-two page order. 694 F.Supp. 750. Thomas appealed and we affirmed the lower court's decision in an unpublished memorandum disposition. 896 F.2d 555. We held, inter alia, that Thomas' appeal was not frivolous. Prior to our decision, the district court had entered an order staying defendants' motion for attorneys' fees until resolution of the appellate proceedings. Following our affirmance of its decision on the merits, the district court issued a one-page order granting defendants' motion for fees under 42 U.S.C. § 1988 in the amount of $39,695.00.

[1-3] A district court may award a prevailing defendant attorneys' fees under 42 U.S.C. § 1988 only if it "finds that the plaintiff's action was frivolous, unreasonable or without foundation, even though not brought in subjective bad faith." Hughes v. Rowe, 449 U.S. 5, 14, 101 S.Ct. 178, 66 L.Ed.2d 163 (1980) (per

curiam) (quoting Christiansburg Garment Co. v. E.E.O.C., 434 U.S. 412, 421, 98 S.Ct. 694, 700, 54 L.Ed.2d 648 (1978)). Attorneys' fees awards are reviewed for abuse of discretion. Hensley v. Eckerhart, 461 U.S. 424, 437, 103 S.Ct. 1933, 1941, 76 L.Ed.2d 40 (1983); Elks Nat. Foundation v. Weber, 942 F.2d 1480, 1483, 1485 (9th Cir. 1991), cert. denied, ___ U.S. ___, 112 S. Ct. 2995, 120 L.Ed.2d 872 (1992). If a district court makes an error of law in such a case, a court of appeals will reverse the judgment under the abuse of discretion standard. See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405, 110 S.Ct. 2447, 2460, 110 L.Ed.2d 359 (1990). Thomas asserts that the district court abused its discretion because 1) the previous panel's conclusion that his appeal was not frivolous necessarily implies that his action was itself nonfrivolous;[1] 2) the district court failed to make the

requisite finding of frivolousness; and 3) the district court offered no support for the amount of the fee award.

[4,5] Although not expressly denominated as such, Thomas' first argument amounts to a contention that the panel's decision as to frivolousness operates as law of the case. Under that doctrine a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case. Milgard Tempering, Inc. v. Selas Corp. of America, 902 F.2d 703, 715 (9th Cir. 1990). Moreover, "'under "law of the case" doctrine, one panel of an appellate court will not as a general rule reconsider questions which another panel has decided on a prior appeal in the same case.'" Merritt v. Mackey, 932 F.2d 1317, 1320 (9th Cir. 1991)(quoting Kimball v. Callahan, 590 F.2d 768, 771 (9th Cir.), cert. denied, 444

U.S. 826, 100 S.Ct. 49, 62 L.Ed.2d 33 (1979)). For the doctrine to apply, the issue in question must have been "'decided either expressly or by necessary implication in [the] previous disposition.'" Milgard, 902 F.2d at 715 (quoting Liberty Mut. Ins. Co. v. E.E.O.C., 691 F.2d 438, 441 (9th Cir. 1982)). The applicability of law of the case here turns on whether we implicitly determined previously that Thomas' action was not frivolous.

[6] There may be cases in which a nonfrivolous or even a meritorious appeal could be taken from an order granting summary judgment against a plaintiff who has filed a frivolous action. For example, if the district court fails to adhere to the procedural requirements of Fed. R. Civ. P. 56 before granting summary judgment, an appeal of such an order would not be frivolous, even though the underlying

action is. However, in this case we addressed the merits of Thomas' claims exclusively. The question before us previously was whether the award of summary judgment for defendants on the merits was proper. In such circumstances, the merits of the appeal are inseparable from the merits of the underlying action. In refusing to award fees on the ground that Thomas' appeal of the district court's order was not frivolous, by necessary implication we decided that Thomas' action itself was not frivolous.[2]

[7] While our previous decision to deny fees on appeal rested on our conclusion that the appeal was not frivolous, not every decision to deny appellate fees is the result of such a determination. Because appellate sanctions are discretionary, it does not necessarily follow that we will award fees even where a district court's award of attorneys' fees

under 42 U.S.C. § 1988 is upheld on appeal.[3] Elks, 942 F.2d at 1485 (citing Price v. Hawaii, 939 F.2d 702 (9th Cir. 1991); cf. Fed. R. Civ. P. 11 (sanctions are mandatory if violation is found). In Price v. Hawaii, we affirmed a lower court decision that the plaintiffs' action itself was frivolous with respect to one defendant but in our discretion declined to award attorneys' fees on appeal to that defendant because that defendant had made arguments on appeal that were themselves frivolous. 939 F.2d at 709-10, 710 n.10.

[8,9] Because, by necessary implication, we previously determined that Thomas' action was not frivolous, the preclusive doctrine of law of the case is applicable. Milgard, 902 F.2d at 715. While courts have some discretion not to apply the doctrine of law of the case, Merritt, 932 F.2d at 1320, that discretion is limited. Depending on the nature of the

case or issue and on the level or levels of the courts or courts involved, a court may have discretion to reopen a previously resolved question under one or more of the following circumstances:

(1) the first decision was clearly erroneous;

(2) an intervening change in the law has occurred;

(3) the evidence on remand is substantially different;

(4) other changed circumstances exist;

(5) a manifest injustice would otherwise result.

Milgard, 902 F.2d at 715; United States v. Tham, 960 F.2d 1391, 1397 (9th Cir. 1991); United States v. Estrada-Lucas, 651 F.2d 1261, 1263-65 (9th Cir. 1980). None of the requisite conditions exists here. Hence, the district court's failure to apply the doctrine of law of the case constitutes an abuse of discretion. Since our prior

determination that Thomas' action was non-frivolous is binding on the district court, its award of attorneys' fees to defendants, which would be authorized under 42 U.S.C. § 1988 only if the action were frivolous, is in error.[4]

R E V E R S E D.

NOONAN, Circuit Judge, dissenting:

Thomas, the appellant, was convicted of ten felonies arising out of skimming at the Tropicana Hotel and Casino. See United States v. DeLuna, 763 F.2d 897 (8th Cir.), cert. denied, 474 U.S. 980, 106 S.Ct. 382, 88 L.Ed.2d 836 (1985). In our previous decision in this case we described him as "the ringleader, who induced, instigated, and supervised his codefendants on how to skillfully skim from the casinos." Thomas v. Bible, unpublished disposition, 896 F.2d 555 (9th Cir. 1990), affirming 694 F.Supp. 750 (D. Nev. 1988). Following our

affirmance of summary judgment against *Thomas*, the district court awarded attorney's fees to the Nevada Gaming Commission and the individuals that Thomas had sued.

The majority now holds that "the law of the case" prohibited the award of attorney's fees in the district court because in the previous appeal we denied fees on appeal saying "[A]ttorney's fees will be awarded if an appeal is entirely frivolous. Thomas's appeal is not frivolous." The majority concedes that there may be appeals that are not frivolous even though the underlying action is frivolous, but concludes that in this case the merits of the appeal were intertwined with the merits of the action, so that a decision that the appeal was not frivolous was a decision that the action was not frivolous. However, our characterization of the appeal as not frivolous was

functionally equivalent to a discretionary decision not to award attorney's fees. The exercise of this discretion by us cannot establish "the law of the case" for the exercise of discretion by the district court.

Moreover, the standard for the award of fees against a § 1983 plaintiff has been laid down with clarity in Hughes v. Rowe, 449 U.S. 5, 14, 101 S.Ct. 173, 178, 66 L.Ed.2d 163 (1980), adopting the standard set in Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978). As stated in Christiansburg, "In sum, a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." Id. at 421, 98 S.Ct. at 700.

The standard set by the Court is in the disjunctive. We err in blithely assuming that the Court engaged in rhetorical surplusage or stuttered saying in five words what required only one. The ordinary rules of construction require that alternatives put in the disjunctive should not be collapsed into a single standard. Azure v. Morton, 514 F.2d 897, 900 (9th Cir. 1975)("the use of a disjunctive in a statute indicates alternatives and requires that they be treated separately").

The Court itself refers to the three distinct standards as "these criteria." Christiansburg, 434 U.S. at 421, 98 S.Ct. at 700. The Court later cautions against automatically labeling an unsuccessful plaintiff's claim as "unreasonable or without foundation." Id. The Court upholds the district court's finding that the defendant's action "cannot be characterized as unreasonable or

meritless." Id. In short, the Court gives three distinct bases on which attorney's fees may be awarded. The majority's decision in the present case goes squarely against the criteria authoritatively set down.

The district court did not make express findings of fact as to why it considered Thomas's case unreasonable or without foundation. A reading of its grant of summary judgment would convince most unbiased persons that one or another such finding was amply justified. This ringleader of the skimmers had been kicked out of gambling in Nevada. Inferentially, he was mad and wanted to harass the officials who had enforced the law against him. He brought an action that all agree was meritless. Nonetheless, to remove all doubt it would be appropriate to follow what we have laid down for a case where such findings are not made and the record

is not completely obvious as to the reason for the fee award, and remand to the district court to "make findings of fact and conclusions of law supporting its decision so that there is a basis for appellate review." Patton v. County of Kings, 857 F.2d 1379, 1381 (9th Cir. 1988).

Elementary respect for the district court calls for such a remand. It is difficult to understand why the present majority is unwilling to follow the standards set by the Supreme Court and the supplementary rule laid down by our court.

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[1] Ninth Circuit rule 36-3 prohibits citation of unpublished decisions except where relevant under the doctrines of law of the case, res judicata, or collateral estoppel. Citation of the memorandum opinion is appropriate in the present circumstances under the first exception.

[2] The dissent rejects this conclusion for two reasons. First, the dissent considers "our characterization of the appeal as not frivolous [w]as functionally equivalent to a discretionary decision not to award attorney's fees." The fact is that if an appeal is non-frivolous we

cannot award appellate fees under Fed. R. App. P. 38, but if an appeal is frivolous, Fed. R. App. P. 38 gives us discretion to grant or deny fees. While the end result may be the same in either circumstance, for purposes of law of the case doctrine the consequences of relying on one ground rather than the other are entirely different. In one case we resolve a legal issue, in the other we exercise our discretionary authority. One, therefore, leads to law of the case as to the underlying issue, the other does not. The dissent's novel "functionally equivalent" concept ignores this distinction as well as the express holding of Thomas 1.

Second, the dissent suggests we have overlooked the fact that the Supreme Court's standard for the award of defendant attorneys' fees under 42 U.S.C. § 1988 is stated in the disjunctive. We have not. The terms "frivolous", "unreasonable" and "without foundation" as used in this context do not have appreciably different meanings. If they did, then a claim could, paradoxically, be frivolous but yet reasonable and with foundation. There is simply no support in logic or precedent for the dissent's reading of Christiansburg. See, e.g., Learned v. Bellvue, 860 F.2d 928, 934 (9th Cir. 1988), cert. denied, 489 U.S. 1079, 109 S. Ct. 530, 103 L.Ed.2d 835 (1989)(citing a number of different formulations of the appropriate test and treating them interchangeably).

[3] Equal Employment Opportunity Comm'n v. Bruno's Restaurant, 976 F.2d 521, 525 (9th Cir. 1992), is not to the contrary. There we affirmed a discretionary award of attorneys' fees but declined to impose fees on appeal.

[4] Our resolution of the appeal on these grounds makes it unnecessary to consider Thomas' alternative contentions.

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

CARL WESLEY THOMAS, Plaintiff, vs. PAUL A. BIBLE; JERRY LOCKHART; BARTON JACKA; the present members of the Nevada Gaming Commission in their official capacity, being JOHN O'REILLY, ROBERT PECCOLE, ROBERT LEWIS, KEN GRAGSON, BETTY VOGLER; and the present members of the Nevada Gaming Control Board in their official capacity, being JERRY CUNNINGHAM, MICHAEL RUMBOLZ, and DENNIS AMARINE, Defendants.	)	CASE NO. CV-S-87-526-RDF **ORDER**

This matter having been submitted to the court for consideration, the Court having been fully advised in the premises, and good cause appearing therefor, it is hereby

ORDERED that Defendants' Motion for Attorneys' Fees and Costs filed on September 12, 1988, being Docket No. 40, is granted as prayed for, to-wit:

Attorney's fees in the amount of $39,695.00 and costs of suit in the amount of $657.30 for a total of $40,352.30.

DATED this 11th day of April, 1990.

/s/ Roger D. Foley
UNITED STATES DISTRICT JUDGE

APPENDIX C

42 § 1988 PUBLIC HEALTH & WELFARE

§ 1988. Proceedings in vindication of civil rights; attorney's fees

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so

far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

R.S. §722; Pub.L. 94-559, § 2, Oct. 19, 1976, 90 Stat. 2641; Pub.L. 96-481, Title II,, § 205(c), Oct. 21, 1980, 94 Stat. 2330.